

Project F-051-2-509  
Clifton-Morenci  
Realignment of U.S. 666

AGREEMENT

Parties

*June* This Agreement is entered into this 27<sup>th</sup> day of June, 1983, between the STATE OF ARIZONA, acting by and through its Department of Transportation, hereinafter called "State", and the PHELPS DODGE CORPORATION, a New York Corporation hereinafter called "Phelps Dodge."

Statutory Authorization

WHEREAS, State is empowered by Arizona Revised Statutes Section 28-1803 to enter into this agreement and the Director of the Arizona Department of Transportation has by that certain resolution attached hereto as Exhibit "A" and incorporated herein by reference, resolved to enter this agreement; and

Purpose

WHEREAS, Phelps Dodge desires to expand its mining operations in the vicinity of Morenci, Arizona, and in so doing will encompass an area presently traversed by U.S. Highway 666 (Safford-Springerville Highway), necessitating the relocation thereof; and

WHEREAS, pursuant to the provisions of that certain Agreement dated May 1, 1973, and recorded in Docket 55, pages 272-284, records of Greenlee County, Arizona, Phelps Dodge desires to relocate said highway so as to avoid said expanded mining operations; and

WHEREAS, both parties concur that the construction of the relocated highway shall be accomplished in stages as determined by Phelps Dodge.

Therefore, the parties hereto covenant and agree as follows:

Method

A. Phelps Dodge shall:

1. For each stage of construction, prepare or cause to be prepared all engineering and survey data required and prepare or cause to be prepared the engineering plans for the highway design and construction, up to the approval of the plans by the State. Said engineering plans shall include the structures required over the San Francisco River, the Southern Pacific Transportation Company's facilities and the Phelps Dodge Railroad.
2. Submit said plans to State for its review and approval.
- 3.a. Donate and convey to State a perpetual easement for a 100-foot-wide right of way plus additional widths where needed for cut and fill slopes and drainage across its lands required for said relocation and shall subordinate its right and interest in and to the lands

of the public domain of the United States, lands of the State of Arizona, and lands of third persons, required for said relocation, to the rights of State for public highway purposes and to the regulations of State which apply thereto for the safety and convenience of the traveling public.

- b. Phelps Dodge shall further grant to State, its agents and contractors any temporary rights of way that may be required for the construction and repair of said highway, over, upon and across its lands at locations as mutually agreed between the parties and in addition to the easement to be granted pursuant to paragraph A.3.a.
- c. The foregoing grants and subordination shall be SUBJECT TO the following stipulations, reservations, covenants and conditions which run with and are attached to all right and interest granted pursuant to this agreement and to any subordination of right and interest herein provided:
  - (1) Said parcels of land shall be used for no other purpose than the construction and maintenance of a public highway.
  - (2) If at any time said parcels of land cease to be maintained as a public highway by State or any of its political subdivisions, the easements granted pursuant hereto and the subordination of Phelps Dodge's rights and interests in said parcels of land shall immediately terminate.
  - (3) Phelps Dodge, its successors and assigns, hereby waives the right to enter upon said parcels of land to develop minerals from the surface of said lands or to develop or penetrate the subsurface between the ground surface and the 40-foot level beneath in areas of fill or the 40-foot level beneath the grade of the highway in all other areas within the right of way lines. Phelps Dodge reserves and retains the right to extract ores, rock, earth and minerals from the surface outside the right of way lines and from within the right of way lines below the said 40-foot level. Phelps Dodge further reserves and retains the right in connection with said mining operations to construct, use and maintain any facilities deemed by it necessary for said purposes, PROVIDED that such activities do not interfere with the use of said parcels as a public highway; and Phelps Dodge agrees to Indemnify and save harmless the State from all liability however arising to any and all persons whomsoever, whether for personal injuries or otherwise, and from any claim of any person for damage to or loss of property by reason of the development, construction, use and maintenance of said mining operations and facilities; FURTHER PROVIDED that if any of said operations or facilities should substantially interfere with

the use for highway purposes of the land included in said right of way, and as a consequence it should become necessary to again relocate said highway, Phelps Dodge, its successors or assigns, shall pay the reasonable and necessary costs of such relocation.

- (4) Phelps Dodge reserves the right for itself and for the Morenci Water and Electric Company, and each of their successors and assigns, to construct, maintain, use, repair, alter and remove, in, along, upon, over, under and across the parcels of land herein described, any and all pipelines, ditches, electrical transportation lines, telephone lines, trestles, bridges, and similar means of conveyance, which they or either of them may desire, which will not prevent the use of said parcels as a State or County highway; PROVIDED, that Phelps Dodge shall give State written notice forty-five (45) days in advance before commencing construction of any such new facility, and all work performed in conjunction with said construction, maintenance, use, repair/alteration, and removal, shall be done in accordance with and conform to all applicable local ordinances and to the Arizona Department of Transportation Manual Volume XII-THREE-D-3 Exhibit 3-1 entitled, "Encroachments in Highway Rights-of-Way," or any subsequent amendment or modification thereof.
- d. Relocate or cause to be relocated all governmental and private utilities occasioned by the expansion of its mining operation and construction of the highway, except for such utility lines as the engineering plans indicate are to be included in construction contracts; PROVIDED, nothing in this Agreement is intended to impose on Phelps Dodge any obligation vis-a-vis any person, corporation or entity not a party to this Agreement, to bear any cost or expense for the relocation of any utility line which it would not otherwise be required to bear.
- 4.a. Pay for all costs for the acquisition of lands needed for the relocation of said highway, other than those presently owned by Phelps Dodge, and for all construction, engineering and administrative costs; PROVIDED, however, Phelps Dodge shall not be required to reimburse State for any engineering or administrative costs in excess of 8% of construction costs as hereinafter defined; FURTHER PROVIDED, amounts paid for the purchase of rights of way easements and direct costs paid or incurred for the acquisition by eminent domain of rights of way easements (to include court costs, expenses of litigation and a reasonable attorney's fee but not ordinary engineering or administrative costs) shall be paid by Phelps Dodge and shall not be subject to said 8% limitation. For purposes of this paragraph "construction costs" shall mean the total of the amount of the contracts awarded for

construction of the highway, as adjusted by any and all change orders, plus any amounts paid for the purchase of rights of way easements, less the amount of any transaction privilege taxes applicable to the contracts awarded.

- b. Deposit in the escrow account established pursuant to paragraph C.3., on or before the first of each month in which administrative, engineering or construction costs are reasonably expected to be incurred, an amount equal to 150% of the administrative, engineering and construction costs reasonably estimated by State to be incurred during such calendar month. In calculating the amount of the required deposit, Phelps Dodge shall be credited with the amount by which the funds then on deposit exceed the amounts which were actually due and payable for the preceding months.
5. Furnish to State a payment bond underwritten by a corporate surety in the amount of \$1,000,000, upon the conditions and in the form attached hereto as Exhibit B.
6. Upon completion of construction of the structure over the Phelps Dodge Railroad, bear at its own cost the responsibility of maintaining the area beneath said structure.
7. Save and hold harmless the State, or any of its departments, agencies, officers, or employees, from all cost and damage incurred which is caused by any activity, condition, or event arising out of the performance or non-performance by Phelps Dodge, or by any one or more of its agents or independent contractors of any provision of this agreement to be kept or performed by Phelps Dodge. The above cost or damage incurred by the State or any of its departments, agencies, officers, or employees shall include in the event of litigation, court costs, expenses of litigation and a reasonable attorney's fee, PROVIDED the State shall have given due and timely notice to Phelps Dodge of any such claim and tendered to Phelps Dodge the defense of the claim; FURTHER PROVIDED, that in the event both Phelps Dodge and State are adjudged negligent then Phelps Dodge shall have the right to recover from State its proportionate share of the award or judgment.
8. Retain at its own expense Firmage and Associates, or other consulting engineers acceptable to Phelps Dodge, to consult with and assist State when and as needed in supervising bridge construction. The contract between Phelps Dodge and such consultant shall provide that any information or decision required from such consultant shall be provided without undue delay.
9. Notify State of the nature and location of such materials as it desires to furnish pursuant to paragraph B.6.c. in sufficient time for testing and for inclusion of test results as a part of the bidding process.

B. State shall:

1. Review the design and construction plans as submitted by Phelps Dodge, and if said plans meet State standards, approve them for use for this project.
2. After the date it has approved the construction plans for each stage of construction, perform any additional surveying, develop any additional engineering data and make any additions or changes to the engineering plans for each approved stage.
3. Prepare right of way plans and written descriptions for a 100-foot-wide strip of land plus additional widths where needed for cut and fill slopes and drainage for the project. After the appropriate recommendation to and resolution by the Transportation Board, prepare appropriate written descriptions of the rights of way to be abandoned pursuant to paragraph 8 of this part B.
- 4.a. Perform land title investigations for all land required for the project, and appraise and acquire all parcels, other than lands presently owned by Phelps Dodge, following State's established appraisal and acquisition procedures.
  - b. It is understood that if State is unable to acquire upon reasonable terms and conditions all of the right of way easements required for said replacement highway across private lands and/or is unable to acquire or extinguish the private interests which may exist in and to the right of way easements over public or private lands, State will acquire, through its power of eminent domain, such easements as in the opinion of State are necessary for said right of way and Phelps Dodge shall reimburse State for the costs incurred for said acquisition as provided by paragraph A.4.a.
- 5.a. Advertise for bids and award and enter into the construction contract for each phase of the project following State's established procedures as detailed in the Arizona Department of Transportation Manual Volume XI-THREE Subsection F-3 entitled, "Advertising the Project for Bids" and Subsection F-4 entitled, "Opening of Bids."
  - b. It is understood and agreed between the parties hereto that the preparation of the specifications, bid lists, award of the construction contracts, the form of such contracts, and any change orders respecting construction contracts are subject to the approval of Phelps Dodge, which approval shall not be unreasonably withheld.
  - c. Phelps Dodge shall have the first right to furnish or to cause to be furnished all or any part of construction materials, provided the materials so furnished meet the prescribed performance specifications and further provided Phelps Dodge complies with the requirements of paragraph A.9.

6. Supervise and administer each construction contract in order to ensure that the contract is completed in accordance with the approved plans and specifications. State shall consult with Firmage and Associates, or other consulting engineers retained by Phelps Dodge, regarding bridge construction.
- 7.a. Upon execution of this agreement, present Phelps Dodge with the bill for administrative and engineering costs to date which, upon approval by Phelps Dodge, shall be paid by Phelps Dodge.
- b. Thereafter, on or before the 25th of the month preceding each month in which administrative, engineering or construction costs are expected to be incurred, present Phelps Dodge with an itemized billing for the administrative, engineering and construction costs reasonably estimated by State to be incurred during the succeeding month.
- c. Pay monthly from the escrow account established pursuant to paragraph C.3., such amounts as are due contractors or State for administrative, engineering, construction and land acquisition costs, not to exceed the amounts provided by paragraph A.4.a.
- d. Provide auditors and engineers of Phelps Dodge with access to State's records and books at all reasonable times and give Phelps Dodge such assistance and information as is necessary for the purpose of auditing or reviewing costs paid or to be paid pursuant to this agreement.
- 8.a. Upon completion of construction and approval thereof by the Transportation Board, acceptance of the newly relocated highway into the State system, and the opening of said relocated highway to the public, the Director of the Department of Transportation shall recommend to the Transportation Board that all that portion of present U.S. Highway 666 from a point just north of the Sonic Restaurant northerly to its intersection with the relocated highway, more particularly described in Exhibit C hereto, shall cease to be used or maintained for public highway purposes, and State shall abandon to Phelps Dodge the easement or right of way therefore.
- b. Upon completion of construction and the opening of said relocated highway to the public, the Department of Transportation shall recondition all that portion of present U.S. Highway 666 from a point near the Greenlee County Highway Garage to a point just north of the Sonic Restaurant, more particularly described in Exhibit D hereto, so as to bring said highway up to acceptable standards; provided, however, that any expenditure required to be made by State in furtherance of this provision shall be conditioned upon the availability of funds for said expenditure. If said highway is abandoned to the County or other political subdivision, said right of way shall remain subject to the stipulations, reservations,

covenants and conditions of paragraph 6 of that certain Agreement dated May 1, 1973, recorded in Docket 55, page 272-284.

9. Save and hold harmless Phelps Dodge, or any of its directors, officers and employees from all costs and damage incurred which is caused by any activity, condition, or event arising out of the performance or non-performance by State or any one or more of its agencies, officers, employees, or contractors of any provision of this Agreement to be kept or performed by State. The above costs or damages incurred by Phelps Dodge or any of its directors, officers, employees, or contractors shall include in the event of any litigation, court costs, expenses of litigation and a reasonable attorney's fee, PROVIDED Phelps Dodge shall have given due and timely notice to State of any such claim and tendered to State the defense of the claim. FURTHER PROVIDED, that in the event both Phelps Dodge and State are adjudged negligent then State shall have the right to recover from Phelps Dodge its proportionate share of the award or judgment.
10. Grant and execute to Morenci Water and Electric Company such utility easements as it may request in writing, upon the same terms and conditions as provided in paragraph A.3.c.(4) hereof.
11. Upon and after completion and acceptance of the relocated highway, maintain the relocated highway, including without limitation all bridges and structures appurtenant thereto, at the sole cost and expense of State.

C. The parties further agree that:

1. This agreement shall remain in full force and effect until completion of construction and acceptance by State of said relocated highway unless sooner terminated as provided in paragraph 2 of this part C; PROVIDED, however, agreements herein relating to maintenance shall be in perpetuity.
- 2.a. Phelps Dodge may, upon written notice to State, require State to suspend further operations under this agreement until further notice without causing a termination of this agreement, or, Phelps Dodge may terminate this agreement at anytime upon thirty (30) days written notice to State; PROVIDED, however, such suspension or termination shall not relieve Phelps Dodge of liability for any and all costs and expenses theretofore incurred which cannot reasonably be avoided by State.
- b. If Phelps Dodge fails timely to make a deposit required by paragraph A.4.b., State may immediately curtail all activities under this agreement and give Phelps Dodge and its surety written notice of such failure. If Phelps Dodge or its surety fails to cure such default within thirty (30) days after such notice is given, State may terminate this agreement by giving written notice to Phelps Dodge of


such termination; PROVIDED, however, no such termination shall relieve Phelps Dodge of liability for any and all costs and expenses theretofore incurred which cannot reasonably be avoided by State.

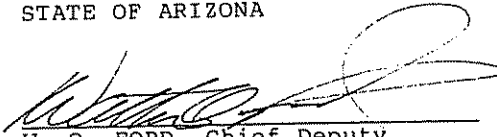
3. The parties shall cause an interest-bearing escrow account to be established with a bank or other depository acceptable to both parties. The account shall be funded by deposits made pursuant to A.4.b. Withdrawals may be made by State for payment of amounts due and payable under paragraph A.4.a. and B.7.c. All amounts attributable to contractor retainages shall be left on deposit in the escrow account until payment of such retainage is due. Interest accrued on the escrow account shall be for the account of Phelps Dodge. Any funds remaining on deposit after all costs and expenses payable under paragraph A.4.a. and B.7.c. have been paid shall promptly be returned to Phelps Dodge.
4. All parties hereto acknowledge that this agreement is subject to cancellation by the Governor pursuant to the provisions of Section 38-511, Arizona Revised Statutes.
5. All parties hereto agree to abide by the applicable arbitration requirements of Section 12-1518 (B) and (C), Arizona Revised Statutes, as amended.
6. Attached hereto and incorporated herein by reference is a copy of State's Resolution authorizing entry into this agreement and the corporate resolution of Phelps Dodge authorizing its entry into this agreement and designating the persons authorized to execute the agreement on its behalf.
7. This agreement is intended to define and limit the rights and obligations of the parties as between themselves only and nothing herein is intended to be for the benefit of any person or entity not a party hereto.

IN WITNESS WHEREOF, the parties have executed this agreement the day and year first above written.

PHELPS DODGE CORPORATION

STATE OF ARIZONA

  
A. H. KINNERBERG,  
Senior Vice President

  
W. O. FORD, Chief Deputy  
State Engineer,  
Arizona Department of  
Transportation

Approved as to form  
EVANS, MITCHEL & JENCKES





STATE OF ARIZONA       )  
                              ) ss  
COUNTY OF MARICOPA    )

On this the 25<sup>th</sup> day of April, 1983, before me  
Mary L. Orr, the undersigned Notary Public, personally  
appeared A. H. KINNEBERG, known to me to be the Senior Vice Presi-  
dent of PHELPS DODGE CORPORATION and acknowledged that he executed  
this instrument for the purposes therein contained.

IN WITNESS WHEREOF I hereunto set my hand and official  
seal.

My Commission expires:

4/20/85

Mary L. Orr  
Notary Public

STATE OF ARIZONA       )  
                              ) ss  
COUNTY OF MARICOPA    )

On this the 27<sup>th</sup> day of June, 1983, before me  
L.W. Matlock, the undersigned Notary Public, personally  
appeared W. O. FORD, known to me to be the Chief Deputy State  
Engineer of the Arizona Department of Transportation and acknowl-  
edged that he executed this instrument for the purpose therein  
contained.

IN WITNESS WHEREOF I hereunto set my hand and official  
seal.

My Commission expires:

My Commission Expires Oct. 9, 1984

L.W. Matlock  
Notary Public

EXHIBIT B

KNOW ALL MEN BY THESE PRESENTS,

That, \_\_\_\_\_,  
(hereinafter called Principal), as Principal, and \_\_\_\_\_,  
\_\_\_\_\_ a corporation organized and existing under the  
laws of the State of \_\_\_\_\_ with its principal  
office in the City of \_\_\_\_\_ (hereinafter called  
the Surety) as Surety, are held and firmly bound unto \_\_\_\_\_  
\_\_\_\_\_ (hereinafter called the Obligee) in the just  
and full sum of \_\_\_\_\_ dollars, to the  
payment of which sum, well and truly to be made, the said Principal  
and Surety bind themselves.

WHEREAS, the Principal has entered into a certain written  
Agreement with the Obligee, known as the A.G. Contract #82-43,  
dated the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

AND WHEREAS pursuant to said Agreement, Principal is  
required to post bond as set forth in Section A, part 5 of said  
Agreement.

NOW, THEREFORE, the condition of this obligation is  
such that, if the Principal shall promptly and faithfully perform  
the Agreement on its part, and shall indemnify and save harmless  
the Obligee from all loss, cost, and expense which the Obligee  
may suffer by reasons of failure so to do all in accordance with  
the terms and conditions of the said Agreement, then this obli-  
gation shall be null and void, otherwise to remain in full force  
and effect.

PROVIDED, HOWEVER, notwithstanding any provision in  
the aforesaid Agreement to the contrary, it shall be a condition  
precedent to any right of recovery hereunder that, in the event  
of any breach of the Agreement on the part of the Principal, a  
written statement of the particular facts stating the nature of  
such breach shall be given as soon as reasonably possible by the  
Obligee to the Surety and the Surety shall not be obligated to  
perform Principal's obligation until thirty (30) days after  
Surety's receipt of such statement.

AND FURTHER PROVIDED, however, that irrespective of  
any provisions of the Agreement to the contrary, no suit or action  
shall be had or maintained against the Surety on this bond unless  
same is brought or instituted within thirty (30) days after the  
expiration of the bond.

AND FURTHER PROVIDED, said bond shall run for the period  
\_\_\_\_\_ to \_\_\_\_\_, and may be continued  
for additional periods of one year by extension certificate  
executed by Principal and Surety.

AND FURTHER PROVIDED, that no assignment of this bond  
shall be made without the express written consent of the Surety.

In Witness Whereof, the said Principal and Surety have signed and sealed this instrument this \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Principal

By: \_\_\_\_\_  
(Seal)

\_\_\_\_\_  
Surety

By: \_\_\_\_\_  
(Seal)

EXHIBIT C

HIGHWAY TO BE ABANDONED

(Reference As Built Drawings)

Beginning at P.T. Station 45 + 71.02 of Non. F.A.S. 101 to Sta. 108 + 01.58 and the beginning of Project S-59 (1) as built, thence to a point where Station 168 + 00 intersects the Clifton City Limits West Boundary.

EXHIBIT D

TO BE BROUGHT UP TO ACCEPTABLE STANDARDS

(Reference As Built Drawings)

Beginning at Station 1475 in F-138 (4) of Project S-218 (11) as built, to Station 1509 + 00, thence to Non. F.A. 138 (50) to Sta. 1531 + 00, thence to S-218 (7) (Highway Bridge) to Sta. 1534 + 56.84, thence to Non. S-218-501, Sta. 1569 + 42.67 and Sta. 3 + 21.23 the beginning of Non. F.A.S. -101 (1947), and continuing to P.T. Sta. 45 + 71.02 the point of ending.

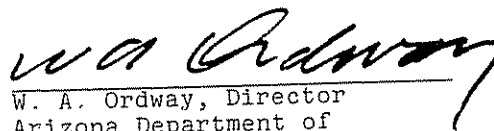
Project: 5-553 (Misc.)

Section: Morenci Realignment

RESOLUTION

BE IT RESOLVED on this 11<sup>th</sup> day of May, 1983,  
that I, W. A. Ordway, as Director, ARIZONA DEPARTMENT OF  
TRANSPORTATION, have determined that it is in the best interests  
of the State of Arizona that the DEPARTMENT OF TRANSPORTATION,  
acting by and through the Highways Division, enter into an  
Intergovernmental Agreement with Phelps Dodge Corporation for  
the relocation of U. S. 666 (Safford-Springerville Highway)  
for the purpose of keeping said highway clear of the expanded  
mining operations in the vicinity of Morenci, Arizona

Therefore, authorization is hereby given to draft said Agreement  
which, upon completion, shall be submitted for approval and  
execution by the Chief Deputy State Engineer.

  
W. A. Ordway, Director  
Arizona Department of  
Transportation

JDC:ea

CERTIFIED COPY OF CORPORATE RESOLUTION

I, Anita H. Laudone, Secretary of PHELPS DODGE CORPORATION, a New York Corporation (the "Corporation") hereby certify that on the 4th day of May, 1983, at a duly called meeting of the Board of Directors of the Corporation at which a quorum of said Directors was present, the following resolution was duly adopted:

\* \* \* \* \*

"RESOLVED, that the President or any Vice President of the Corporation, with or without the joinder of any other officer, is hereby authorized and empowered, for and on behalf of the Corporation:

(a) to enter into and execute with the STATE OF ARIZONA an agreement granting temporary and permanent rights of way for the realignment of a portion of U.S. Highway 666 near Clifton and Morenci, Arizona, and agreeing to pay for the costs of relocating said highway, known as Arizona Department of Transportation project F-051-2-509, upon such terms and conditions as he shall deem appropriate; and

(b) to make, execute and deliver, and to accept and receipt for, all such further instruments and documents, and to do and perform all such acts and things, as may be desired, required or deemed advisable by said officer in connection with the matters herein mentioned."

\* \* \* \* \*

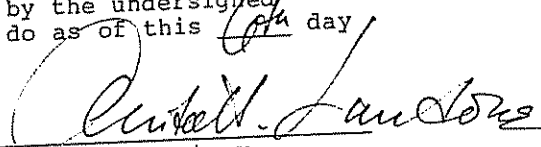
The undersigned further certifies that each of the following persons is now and at all times since the adoption of the foregoing resolution, has been a duly elected officer of the Corporation, holding the office set forth below opposite his respective name:

<u>NAME</u>	<u>OFFICE</u>
A. H. Kinneberg	Senior Vice President
L. R. Judd	Vice President and General Manager

The undersigned further certifies that the foregoing resolution has not been modified or amended, and has been duly recorded in the minute book of the Corporation.

1/...

IN WITNESS WHEREOF, this certification has been  
signed on behalf of the Corporation by the undersigned  
officer being duly authorized so to do as of this 6th day  
of June, 1983.

  
Secretary

(Corporate Seal)